

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

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RELIABLE DISPOSAL, INC.

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and

CASES GR-7-CA-46874
7-CA-47389

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LOCAL NO. 7, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
AFL-CIO

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Joseph Canfield, Esq. and
Counsel for General Counsel.

Dennis M. Devaney, Esq. and
Kurt M. Graham, Esq.,

Counsel for Respondent.

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Andrew Meulman, for the
Charging Party.

DECISION

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A hearing was held in Stevensville, Michigan on September 22, 2004. After the hearing closed, Counsel for General Counsel moved for the admission of documents received from Respondent at a time that precluded examination of those documents without delaying the hearing.¹ Respondent opposed, alleging those documents were (1) provided to the Board eight months before the hearing during investigation of case 7-CA-46874 and that General Counsel had ample opportunity to examine some of the proposed exhibits before the hearing; (2) the proposed exhibits fall outside the parties stipulation at the hearing in that those proposed exhibits were available to General Counsel prior to hearing; (3) if the proposed exhibits are admitted they have a diminished probative value because they are being offered after close of the record; (3) introduction at this time prejudices Respondent's right to cross examine; and (4) the

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When asked if he rested Counsel for General Counsel stated, "I do, your Honor, with one caveat. And that caveat is this. I had subpoenaed some documents. I have not had an opportunity to go through them and as we talked about my going through them at the end of the day, I wanted to do that." Counsel for Respondent replied, "And that's, your Honor, that's, from our perspective would be fine. We actually provided those documents to the Board during the investigation."

proposed exhibits are irrelevant. Subsequently, Counsel for General Counsel filed a reply. Respondent filed a response to that reply and General Counsel filed a correction to its response. In summary Counsel for General Counsel argued in favor of admission of General Counsel Exhibits 7(a) & (b), 8(a), (b), (c) and (d), 9(a), (b) and (c), 10(a) and (b), 11, 12(a), (b) and (c), 13, 14 and 15. Respondent opposed receipt of those documents.

I find that regardless of whether Respondent provided proposed exhibits before the hearing, the proposed exhibits are relevant. The proposed exhibits do not fall outside the parties' agreement allowing Counsel for General Counsel an opportunity to examine those and other subpoenaed documents as a time after the hearing closed on September 22, 2004. Those documents may not be excluded because their probative value has not been diminished. Respondent was not deprived of the right of cross-examination. Instead Respondent waived that right by its agreement to go forward in light of General Counsel's caveat to closing. Finally, the proposed exhibits are relevant. I grant General Counsel's motion and admit the above-mentioned exhibits.

Jurisdiction

Respondent admitted that, at material times it has been a corporation with a facility located in Stevensville, Michigan where it is engaged in the business of waste collection, disposal and recycling. During the calendar year that ended December 31, 2003, a representative period, Respondent in the course of its business operations purchased and received goods and services valued in excess of \$50,000 directly from points outside Michigan. Respondent has been an employer at all material times engaged in commerce within the meaning of the National Labor Relations Act.

The Union Organizing Campaign:

Roll off drivers started talking about having a union at Respondent's facility in late September or early October 2003.² Andy Muelman is the Union³ business agent. He became involved in the campaign when he met with six or seven of Respondent's employees at the Waffle House on November 9, 2003. Those employees included Don Penlay, Jeff Winslett, Dan Kuhens, John Tomlinson and Russell Drake. Muelman believed that Norm Forrest was present. The Union subsequently filed a petition for election on January 13, 2004 and the parties signed a stipulated election agreement.

THE UNFAIR LABOR PRACTICES?

General Counsel alleged that Respondent engaged in violations of Section 8(a)(1) and (3) of the Act.

² Roll Off Driver Jeff Winslett initiated the union campaign by first talking with Roll Off Driver Don Penlay.

³ The Union is the charging party herein.

The 8(a)(1) allegations:**October 22, 2003:****Solicited employee grievances (Stoub):****Remedied employee grievances (Stoub):**

Donald Penlay and Thomas Cawley testified about a safety meeting attended by Eric Stoub, Sonny Fuller and the Stevensville, Michigan roll off drivers. General Manager Eric Stoub spoke to the employees.

Stoub first discussed safety and then after a short time he said that he did not need anybody telling him what to do, that he had his own program and there was nothing they could do to make things go faster, they just slow things down. Stoub said that arbitration takes too long and he didn't need that at his facility and at one point in the meeting, Jeff Winslett spoke out and said that Stoub was referring to the Union. Stoub did not respond. Instead he just smiled. Then at another point Stoub pointed directly at Winslett, leaned across the table and shook his hand in Winslett's face and said if anybody had any problems to put them on the table. Stoub said that he could handle any problems that occur and employees should come to him. He told the roll off drivers that they didn't need any outside help making decisions for them, that they could handle their own problems that he could fix any problems they may have. John Tomlinson testified that Stoub said, "we can handle our own problems here, we don't need anybody from the outside. Tomlinson recalled that at one point Stoub walked around the table to where Winslett was sitting and said they did not need anybody to come in there and tell him how he should make decisions, he was capable of making his own decisions, that he did no need anybody to be around the table.

Jeff Winslett told Stoub there were some problems. He explained the hourly rate employees were not receiving raises, that the incentive pay was not fair and that in the New Buffalo area the incentive was not being fully applied when the driver picked up a full box⁴ and dropped it at the land fill on what is called a half pull. He said that was why the drivers were upset. Stoub said that he did not realize that and he would change it. The system was changed. Tomlinson asked about incentive and Stoub said that things could be worked out and they did not need somebody from the outside coming in and telling them how to do it.

Eric Stoub admitted holding the meeting on October 22, 2003. He admitted saying that he would fix and that he actually did fix the incentive plan.

Findings:**Credibility:**

In view of the full record including my observation of the witnesses' demeanor and other observations as explained in more detail herein, I am convinced that

⁴ It is common in the industry to use box to describe a container.

testimony including that by Donald Penlay and John Tomlinson was truthful. Other testimony and the full credited record corroborated that testimony.

Findings of Fact:

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The credited testimony proved that Eric Stoub met with roll off driver at Respondent's Stevensville facility on October 22, 2003. Stoub said among other things, that he did not need outside help in running the facility. His remarks including remarks about arbitration and his smiling and failing to deny to Jeff Winslett that he was referring to the Union showed that Stoub was referring to union representation of roll off drivers. Eric Stoub commented to the employees that he could handle their problems. Stoub asked the employees to put any problems on the table and after Jeff Winslett, explained incentive pay problems, Stoub promised to correct those problems. He also told John Tomlinson that things could be worked out and that he did not need outside help. The incentive pay problems were corrected. That fact was not in dispute. Respondent conceded in its brief that it revised portions of its Incentive Pay Program in November 2003.

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October 31, 2003:

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Coerced an employee in an effort to make the employee quit (Sales Manager Gil Logan):

Threatened plant closure (Sales Manager Gil Logan):

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Jeff Winslett testified that he noticed that Sonny Fuller and Gil Logan were following him when he left the yard on October 31, 2003. After Winslett made his only stop on that route, Logan and Fuller came over to Winslett's truck. Logan swung Winslett's truck door open and, while standing a foot or two from the truck, Logan yelled, what is it you want from this company; what is your problem; and he told Winslett that if he wanted a Union job, he should go someplace else and get one. Logan told Winslett they had their own program, that this is no place for anybody that wanted anything to do with the Union and that if Winslett knew anything about the Union, he should tell them. Gil Logan also said that if "we voted the Union in, that the company was gonna go broke, be belly up and (Winslett) and a lot of other drivers would be without work." Logan kept saying that Winslett should not have anything to do with the Union; that the Union isn't coming in; and that Winslett was putting other drivers' jobs in jeopardy.

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Sonny Fuller was the last to speak to Winslett during that conversation. Fuller told Winslett that if the Union came in that he (Fuller) wouldn't have a job.

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According to Winslett, during that October 31 incident his supervisor, Jim Johnson, phoned Winslett and asked why he was late for his next stop. Winslett told Johnson he was being inspected by Logan and Fuller. At the conclusion of his conversation with Logan and Fuller, Fuller gave Winslett an inspection report that had not been completed. Winslett wrote his name on the report and gave it back to Fuller.

Gilbert Logan was formerly Respondent's sales manager. Logan testified about the check that he and Sonny Fuller conducted on Jeff Winslett. Winslett passed them on a four-lane highway as he and Fuller were returning to Respondent's office. They then turned around and followed Winslett. Logan observed Winslett swerve into the left lane to avoid a vehicle turning into a McDonald's restaurant. Winslett was traveling over the speed limit and then he continued to speed through a residential district. Logan and Fuller stopped and talked with Winslett. Winslett told them they were forcing him to drive fast in order to make the money that he needed to make. Logan denied telling anyone that if they did not like the way the company was run they could go work for a union company. He denied saying the plant would close if the union was selected and he denied telling anybody that the pay rate would increase if they didn't select the union.

Findings:

Credibility:

I have considered demeanor and the full record in determining credibility. Respondent argued that it had no knowledge of a union organizing campaign on October 31. As shown above, I have found that Respondent knew of its employees' union activities from on or before October 22.

Respondent's contention that Winslett was stopped for nothing other than a safety check on October 31 is also put in question. The report shows that Winslett was observed from 10:45 until 12:08 while on route # 87. There are several pieces of evidence that tend to show how much of Winslett's run was consumed by his encounter with Logan and Fuller. First, Winslett testified without rebuttal, that he made one stop on that run and that stop was at Sawyer, which is about 7 miles from Respondent's Stevensville facility. Winslett also testified without rebuttal, that his supervisor, Jim Johnson, called him during his confrontation with Logan and Fuller and asked why he was 40 minutes late for his stop on his next run. Winslett explained that he was going though an inspection by Logan and Fuller.

The report of that October 31 incident appears to note only one written comment regarding Winslett's job performance. That is the comment, "Driver is Driving to Fast – to aggressively." Then all five boxes under performance are checked NA. If, as Respondent contended, Logan and Fuller only conducted the inspection as noted on the report, the observation time should have been much less than an hour and 23 minutes and much less than the more than 40 minutes that had elapsed when Jim Johnson phoned Winslett.

Moreover, in this instance I note that Respondent witnesses Logan and Fuller did not deny substantial portions of Winslett's testimony regarding this incident.

Even though Fuller testified, he was not asked about this incident. He was asked generally if he told employees that he would lose his job if the union came in. Fuller replied, "no, not that I recall."

Gil Logan did not deny that he asked Winslett what he wanted from the company or that he told Winslett that the company was no place for anyone who wanted anything to do with the Union. He did not deny that he told Winslett that he should tell them anything he knew about the Union. Logan did not deny that he threatened Winslett that he was putting other drivers' jobs in jeopardy. Logan did not deny that Fuller said he would lose his job if the Union came in.

In view of all the above, my observation of demeanor and the full record, I fully credit the testimony of Jeff Winslett and do not credit the testimony of Gil Logan and Sonny Fuller.

Findings of Fact:

The credited testimony showed that Winslett was questioned about the employees' union activities. He was threatened that he should go to another job if he wanted the Union. Winslett was told that this was no place for anybody that wanted anything to do with the Union and that if the Union came in the Company would go broke and Winslett and a lot of drivers would be out of work. Sonny Fuller threatened that he would lose his job if the Union came in.

Moreover, although Winslett was presented with an incomplete inspection form at the conclusion of his meeting with Fuller and Logan, the credited testimony shows that neither Winslett nor his truck was inspected.

***October 31 and early November 2003:
Threatened loss of his job (Sonny Fuller):***

As shown herein, Sonny Fuller was the last to speak when he and Gil Logan confronted Jeff Winslett on October 31. Fuller told Winslett that if the Union came in that he (Fuller) wouldn't have a job.

Winslett phoned Sonny Fuller shortly before November 9, 2003, after receiving a complaint that John Tomlinson had been threatened by another employee to keep his mouth shut about the Union. Winslett told Fuller that the guy that threatened Tomlinson was on the fire department with Fuller. Among other things, Fuller asked Winslett what did he know about the Union. He asked if Winslett was involved. Fuller asked if Winslett was leading the Union and was he trying to get the Union in. Winslett said that he did not want to discuss what he was doing at home and he said that he didn't know anything about the Union but there were a lot of people real unhappy. Fuller said, "I'm gonna lose my job if the union comes in."

As discussed below in more detail, within a day or so before or after November 9 Winslett talked with Tom Golden and Sonny Fuller in the parking lot. At the end of that conversation Fuller said, "well you know if that union stuff comes in here, I've told you I'm gonna lose my job."

Findings:

Credibility:

Throughout this matter I have considered demeanor and the full record in determining credibility. As shown above, Gil Logan did not deny that Sonny Fuller said he would lose his job if the Union came in. Even though Sonny Fuller testified, he was not asked about the October 31 incident. In view of all the above, I fully credit Jeff Winslett's testimony in regard to this allegation. I do not credit the testimony of Sonny Fuller.

Findings of Fact:

I find that Sonny Fuller threatened employees on several occasions that Fuller would lose his job if the Union came in.

First part of November 2003:

Interrogation:

Operations Manager Sonny Fuller:

Winslett testified that he had several conversations with Sonny Fuller including one that occurred just outside Supervisor Jim Johnson's office space around the first of November 2003. Fuller asked Winslett if he had anything to do with the Union and if he did, he should come to them and let them know what was going on.

John Tomlinson testified that he was confronted while fueling his truck, by one of the commercial drivers. Among other things, the commercial driver told Tomlinson that he had a message for Tomlinson's roll off buddies, that they have been trying to get the union in there and he wanted the crap stopped.

Tomlinson called Jeff Winslett about the incident with the commercial driver. Winslett phoned Sonny Fuller shortly before November 9, 2003, after receiving the complaint from Tomlinson. Winslett told Fuller that a guy that threatened Tomlinson was on the fire department with Fuller. During that conversation Fuller asked Winslett what did he know about the Union. He asked if Winslett was involved; if Winslett was leading the Union; and was he trying to get the Union in. Winslett said that he did not want to discuss what he was doing at home and he said that he didn't know anything about the Union but there were a lot of people real unhappy.

Findings:

Credibility:

In consideration of their demeanor and the full record and in view of my previous credibility findings, I credit the testimony of Jeff Winslett and John Tomlinson.

Findings of Fact:

The credited evidence proved that Operations Manager Sonny Fuller questioned Jeff Winslett on several occasions about Winslett and other employees' union activities. During one of those conversations, which occurred shortly after November 9, Fuller asked Winslett what he knew about the Union, whether Winslett was involved, whether Winslett was leading the Union and trying to get the Union in. Fuller threatened that he would be fired if the Union came in.

November 8, 2003:

Interrogation:

Operations Supervisor Jim Johnson:

The parties stipulated that if called Russell Drake would testify among other things, that around November 8, 2003 Jim Johnson interrogated him about who was involved in the union. Drake replied the roll off drivers. Johnson then said that if the union came in they might not get any overtime.⁵

Jim Johnson was roll off dispatcher supervisor. He denied that he asked any employee about their support for the Union.

Findings:

Credibility:

Russell Drake did not testify. Instead the parties stipulated as to what he would have testified if called. To the extent that stipulation does not conflict with the testimony of Jim Johnson or anyone else that testified, I credit the stipulation. Jim Johnson denied that he asked any employee about that employee's union activity. Johnson did not specifically deny asking Russell Drake about other employees' union activities. Therefore, I credit the evidence introduced through the stipulation, that Johnson asked Drake who was involved in the Union.

The stipulation as it involved Johnson, was also to the effect that Johnson told Drake that if the Union came in they might not get overtime. Johnson denied that he had a conversation with any roll off drivers in which he said that if the Union were selected, they would lose overtime.

⁵ The parties stipulated that Russell Drake was employed by Respondent until he quit, that he attended the Waffle House union meeting, that Gil Logan interrogated Drake about the Union in the fall of 2003, and that Logan asked him what was going on and what the problems were. The stipulation included that Drake would testify that around November 8 Jim Johnson interrogated him about who was involved in the Union and that Drake told Johnson it was the roll off drivers. Johnson told Drake that if the Union came in they might not get overtime. Drake would also testify that since he started working with Respondent he received speeding tickets while driving Company vehicles and that he did not receive reprimands.

With that in mind I credit the parties stipulation that Drake would have testified that Johnson interrogated him about who was involved in the Union. I do not credit the stipulation that Drake would have testified that Johnson threatened him that employees may lose overtime if the union came in. Johnson denied that and I observed nothing in his demeanor caused me to doubt his testimony.

Findings of Fact:

In view of the parties' stipulation and my credibility findings I find that Jim Johnson interrogated Russell Drake regarding which other employees were involved in the Union.

November 9, 2003:

Union Business Agent Andy Muelman met with six or seven of Respondent's employees at the Waffle House on November 9, 2003.

After November 9, 2003:

Interrogation:

General Manager Eric Stoub:

Donald Penlay was at the fuel pump at Respondent's Stevensville facility a few days after November 9 when Eric Stoub drove up and asked Penlay if he knew anything about this union that was going on. Penlay replied that he had heard something about it. Stoub said that he really didn't need help in here and that he could make decisions. He didn't need anybody making decisions for us. Stoub talked about his father didn't do well with a union. Penlay said that his brother had retired out at Bosch and had got a pretty good contract for himself. Stoub asked Penlay if Russell Drake was involved. Penlay replied that not as he knew. Penlay told Stoub he needed to meet with the guys and find out who is getting high pay and who is getting low pay and he would know who was involved in the union.

Findings:

Credibility:

In consideration of my observation of demeanor of the witnesses and the full record including observations shown above, I do not credit the testimony of Eric Stoub. I was impressed with the demeanor of Donald Penlay. His testimony was in accord with my overall findings herein. I credit Penlay's testimony.

Findings of Fact:

The credited evidence showed that Eric Stoub questioned employee Donald Penlay about the employees' union activities, and about whether employee Russell Drake was involved in the Union.

After November 9, 2003:

Interrogation:

Operations Supervisor Tom Golden:

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As mentioned above, within a day or so before or after November 9 Tom Golden and Sonny Fuller approached Jeff Winslett in the parking lot. Golden asked Winslett what did he know about this union stuff. Winslett replied, “absolutely nothing.” Fuller said, “well now we’re hearing rumors,” and he said, “if you know anything about this union stuff, you ought a just come to us right now.” As shown above Fuller also said that he would lose his job if the Union came in.

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Tom Golden is the operations manager. He testified that he and Sonny Fuller did have a conversation with Jeff Winslett in the parking lot in late October or early November about the Union. He and Fuller were trying to find out what the union campaign was all about. They were trying to get the root cause of the union effort in a non-threatening manner. They wanted to know what were the employees’ problems. Golden denied that Fuller asked Winslett whether he was involved with the union campaign.

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Findings:

Credibility:

Tom Golden admitted that he and Fuller questioned Jeff Winslett in the parking lot in an effort to determine the root cause of the Union campaign. In view of that admission, the demeanor of the relevant witnesses and the full record, I am convinced that Jeff Winslett testified truthfully.

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Findings of Fact:

The credited evidence showed that Logan and Fuller actually questioned Winslett about which employees were involved in union activity. Moreover, Fuller threatened that the Union activities were so serious that he would lose his job if the Union were successful.

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A day or so after November 9:

Interrogation by Sonny Fuller:

The day after Golden and Fuller stopped Winslett in the parking lot, Fuller came to Winslett holding a roll sheet with all the drivers’ names on the sheet. Fuller told Winslett, that he didn’t have to point to any of the names but Fuller asked Winslett to smile whenever Fuller pointed to a name that was involved with the Union. Winslett replied that he could not do that. Fuller repeated that Winslett was to just smile and he then went down the list of names. Winslett did not respond to any of the names until Fuller named some of Fuller’s own buddies in the fire department. Winslett then started smiling. Fuller dropped the roll sheet and said, “*this ain’t gonna work, is it?*”

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Sonny Fuller denied in general that he interrogated employees about whether they were union supporters or that he threatened or coerced any employee regarding union support. He denied asking any employee to conduct surveillance on union sympathizers.

Findings:

Credibility:

In view of the full record and especially my observation of the demeanor of Jeff Winslett and Sonny Fuller, I am convinced that Winslett was truthful.

Findings of Fact:

The above credited testimony shows that supervisor Fuller questioned Winslett about the identity of Union supporters among Respondent's employees.

2004:

The Pay Increase:

Counsel for General Counsel argued that at a time after a petition was filed on January 13 and an election was held on February 19, 2004 Respondent extended a pay increase to its unit employees. Normally employees received a pay increase after completion of their probationary period. However, it was not the normal practice for employees to receive across the board pay increases in January or February. For example, Penlay started in April 2001 at \$10 an hour. After 90 days Penlay received a \$1.00 an hour pay increase but he did not receive another pay increase until after the petition and before the election.

Respondent conceded that it granted a wage increase to its employees on February 17, 2004. It contended that pay raise was not motivated by a desire to undermine the employees' support for the Union. Instead the pay increase was granted after companies in the Chicago market were examined in the aftermath of a strike in that area by employees of unionized waste collection companies.

Findings:

Credibility:

The evidence was not in dispute that Respondent granted unit employees a pay increase on February 17, 2004.

Findings of Fact:

I find that Respondent granted a pay increase after the filing of a petition for an election with the NLRB and it was not Respondent's practice to grant pay increases at that time or in that manner. I am not convinced by Respondent's argument that the pay

raise coming two days before the election was not motivated by a desire to undermine Union support. Instead, I find that Respondent failed to show why it was necessary to grant the pay increase at that time for reasons having nothing to do with the NLRB election. Respondent's grant of a pay increase on February 17, 2004 constitutes an unfair labor practice.

Legal Conclusions as to Section 8(a)(1) allegations:

In regard to the allegations in general Respondent argued that comments by its supervisors constituted nothing more than comments employers are permitted to make under the Act. In that regard I note that beginning during the October 22 safety meeting some time after Jeff Winslett stated that Eric Stoub was referring to the Union, Stoub pointed directly at Winslett, shook his hand in Winslett's face and said that if anybody had any problems to put them on the table.

On October 31 Gil Logan shouted to Jeff Winslett among other things, that if he wanted a Union job, he should go someplace else and get one. Logan threatened Winslett that the company would go broke and a lot of drivers would be without work if the Union came in. On more than one occasion Sonny Fuller said that he would lose his job if the Union came in.

In view of that evidence as well as the evidence that Respondent granted an unlawful pay increase shortly before the NLRB election and that Respondent discharged or laid off three employees because of their union activities, I am unable to agree with Respondent that it did nothing more than exercise its right of free speech.

Interrogation:

The United States Second Circuit Court of Appeals has applied the following test in determining whether interrogation constitutes an unfair labor practice:

(1) Was there a history of employer hostility and discrimination; (2) did the interrogator appear to be seeking information on which to take action against individual employees; (3) how high was the interrogator in the company hierarchy; (4) what was the place of interrogation and was there an atmosphere of "unnatural formality"; and (5) Was the employees' reply to the interrogation truthful. [*Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964).

In this case there were several incidents of supervision questioning employees about union activities.

During the first part of November Operations Manager Fuller talked to Jeff Winslett outside the office of supervisor Jim Johnson. Fuller asked Winslett if he had anything to do with the Union and if he did, he should come to them and let them know what was going on. Then, also shortly before November 9 Winslett phoned Fuller and complained that roll off driver John Tomlinson was confronted about the Union by another driver at the fuel pump. During that conversation Fuller asked Winslett what did

he know about the Union. He asked if Winslett was involved; if Winslett was leading the Union; and was he trying to get the Union in. Winslett said that he did not want to discuss what he was doing at home and he said that he didn't know anything about the Union but there were a lot of people real unhappy. Fuller said, "I'm gonna lose my job if the union comes in."

The parties stipulated that Russell Drake would testify that Jim Johnson interrogated him around November 8 about who was involved in the Union.

After November 9 General Manager Eric Stoub drove up to the fuel pump and asked Donald Penlay if he knew anything about this union that was going on. Penlay replied that he had heard something about it. Stoub said that he really didn't need help in here and that he could make decisions. He didn't need anybody making decisions for us. Stoub talked about his father didn't do well with a union. Penlay said that his brother had retired out at Bosch and had got a pretty good contract for himself. Stoub asked Penlay if Russell Drake was involved. Penlay replied that not as he knew. Penlay told Stoub he needed to meet with the guys and find out who is getting high pay and who is getting low pay and he would know who was involved in the union.

Operations Supervisor Tom Golden and Operations Manager Sonny Fuller approached Jeff Winslett in the parking lot a day or so after November 9. Golden asked Winslett what did he know about this union stuff. Winslett replied, "absolutely nothing." Fuller said, "well now we're hearing rumors," and he said, "if you know anything about this union stuff, you ought a just come to us right now." As shown above Fuller also said that he would lose his job if the Union came in. Golden admitted that he and Fuller were trying to find out what the Union campaign was all about; they were trying to find out the root cause of the Union effort and they wanted to know what the employees' problems were.

The day after Golden and Fuller stopped Winslett in the parking lot, Fuller came to Winslett holding a roll sheet with all the drivers' names on the sheet. Fuller told Winslett, that he didn't have to point to any of the names but Fuller asked Winslett to smile whenever Fuller pointed to a name that was involved with the Union. Winslett replied that he could not do that. Fuller repeated that Winslett was to just smile and he then went down the list of names. Winslett did not respond to any of the names until Fuller named some of Fuller's own buddies in the fire department. Winslett then started smiling. Fuller dropped the roll sheet and said, "*this ain't gonna work, is it?*"

By applying the *Bourne* criteria, I find, (1) there was no showing of Respondent having a history of employer hostility and discrimination; (2) in the cases of Sonny Fuller it did appear that he was seeking information on which to take action against individual employees. In the first part of November he asked Jeff Winslett if he had anything to do with the Union and if so Winslett should come to them and let them know what was going on. Shortly before November 9 Fuller asked Winslett what did he know about the Union, was Winslett involved, was Winslett leading the Union and was Winslett trying to get the Union in. Fuller told Winslett that Fuller was going to lose his job if the Union

came in. General Manager Eric Stoub asked Penlay if he knew anything about the Union and he told Penlay that he did not need help and that his father had not done well with a union. Tom Golden and Sonny Fuller asked Winslett what did he know about this union stuff. Fuller replied that they heard rumors and if Winslett knew anything he ought to come to them. Subsequently, Fuller came to Winslett and asked Winslett to identify Union supporters from a sheet of names held by Fuller.

As to (3) how high the interrogator was in Respondent's hierarchy, a large portion of the entire supervisory force appeared to engage in interrogation including the general manager. Regarding (4) it does not appear that any of the interrogation occurred in offices or other places where there was an atmosphere of unnatural formality. As to (5) it appears that the employees were routinely untruthful in answering supervisors' questions about the Union.

Moreover, the situation here was different from instances where the employees questioned were known to be Union supporters. Even though one employee, (Jeff Winslett) was in fact the primary mover behind the Union movement, Respondent continually argued that it did not know of the activities of any employees and the credited evidence failed to show that any of the interrogated employees were open union supporters at the time of the respective interrogations (*Rossmore House*, 269 NLRB 1176 (1984). In view of the above, I find that Respondent did engage in interrogation in violation of Section 8(a)(1) of the Act.

Threatened its employees:

I find comments by Gil Logan and Sonny Fuller to Jeff Winslett on October 31 constitute Section 8(a)(1) violations including threats (1) to force Winslett to leave and seek another job; (2) that Respondent was no place for anyone that wanted the Union; (3) that the Union would cause the Company to go broke; and (4) that the Union would cause a lot of drivers to be out of work. On October 31 and on other occasions thereafter, Sonny Fuller threatened Winslett that Fuller would lose his job if the Union came in. I find those threats constitute violations of Section 8(a)(1) of the Act.

Soliciting and Promising to Remedy Grievances:

Remedied employee grievances (Stoub):

The credited testimony proved that Eric Stoub met with roll off driver at Respondent's Stevensville facility on October 22, 2003. Stoub asked the employees to put any problems on the table and after Jeff Winslett, explained incentive pay problems, Stoub promised to correct those problems. He also told John Tomlinson that things could be worked out and that he did not need outside help. The incentive pay problems were corrected. Respondent conceded in its brief that it revised portions of its Incentive Pay Program in November 2003.

Respondent cited *Sunset Coffee & Macadamia Nut Co-Op of Kona*, 225 NLRB 1021, 1023 (1976), and argued that the solicitation of grievances is not a violation

per se and that there must be some promise by the employer that the grievances would be remedied. Here, that condition was satisfied. Stout asked employees to state their concerns and then he promised to remedy the concerns expressed by Jeff Winslett. Those concerns over incentive pay were remedied.

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Respondent also cited ***Tricil Environmental Mgt.***, 308 NLRB 669, 673 (1992), while arguing that there must be a showing that the employer promised to remedy grievances as a reward for refusing to support the Union. It is true that Stout never said specifically to the employees that their grievances over incentive pay would be remedied if they refused to support the Union. However, as shown herein, Stout told the employees that he did not need help in running the operation, that he could handle their problems and he smiled when asked if he was referring to the Union. Stout then asked that the grievances be put on the table and after employees expressed grievances, Stout promised to remedy those grievances. I find that those actions constitute a promise to remedy grievances in return for the employees' rejection of the Union.

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Respondent argued that its actual revision of portions of its Incentive Pay Program was coincidental and that it never intended by that action, to undermine support for the Union [Respondent cited, among others, ***Hankins Lumber Co.***, 316 NLRB 837, 848 (1995)]. In that decision, at page 848, the ALJ stated:

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Under Board law, the General Counsel establishes a prima facie violation of the Act by showing that a discretionary pay increase occurred, as here, early in a union organizing campaign. The burden of rebuttal then shifts to the employer to show that its purpose in granting the discretionary pay increase was not to dissuade its employees from joining or supporting the union.

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As found herein, the credited evidence proved that Respondent knew of the Union organizing campaign on or before October 22 when Eric Stoub spoke to roll off drivers. Stoub then told the roll off drivers that he did not know of the incentive pay problem but that he would correct the problems. I find that Respondent's action in promising to and actually revising its incentive pay program was motivated by a desire to undermine the employees' union activities and constitutes an unfair labor practice.

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Coerced an Employee to Quit:

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As shown above, the credited evidence showed that Gil Logan attempted to coerce Jeff Winslett to quit on October 31. Among other things, Logan told Winslett that if he wanted a Union job, he should go someplace else and get one. I find that constitutes a violation.

Granted its bargaining unit employees a pay increase:

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I find that Respondent granted a pay increase after the January 13, 2004 filing of a petition with the NLRB and before the NLRB conducted an election on February 19, 2004. Respondent conceded that it did grant a pay increase on February 17, 2004. It was not Respondent's practice to grant pay increases at that time or in that manner.

The granting of a pay raise during a union campaign before an election has been found to violate Section 8(a)(1) of the Act [**NLRB v. Exchange Parts**, 375 U.S. 405 (1964)]. I find that to be the case here.

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The 8(a)(3) allegations:

October 31, 2003:

More strictly enforced work rules (Fuller and Logan)

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As shown several times herein, Sonny Fuller and Gil Logan followed Jeff Winslett on October 31, 2003. After Winslett stopped the truck, Logan swung Winslett's truck door open and yelled, what is it you want from this company; what is your problem; and if Winslett wanted a Union job, he should go someplace else and get one. Logan said they had their own program and this is no place for anybody that wanted anything to do with the Union and that if Winslett knew anything about the Union, he should tell them. Gil Logan also said that if "we voted the Union in, that the company was gonna go broke, be belly up and (Winslett) and a lot of other drivers would be without work." Logan kept saying that Winslett should not have anything to do with the Union; that the Union isn't coming in; and that Winslett was putting other drivers' jobs in jeopardy. Fuller told Winslett that if the Union came in that he (Fuller) wouldn't have a job.

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As shown below, during his discharge, Winslett discovered that Respondent subsequently decided to treat the October 31 check as a safety violation even though Winslett was not told on October 31 that he had done anything wrong. That incident was then used as one of the alleged factors in deciding to discharge Winslett.

Findings:

Credibility:

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I have found above that Jeff Winslett testified truthfully. I credited his testimony and did not credit conflicting testimony.

Findings:

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The credited testimony showed that it was not Respondent's practice to conduct inspections in the manner of its alleged October 31 inspection of Jeff Winslett. By that action Respondent more strictly enforced work rules in violation of Section 8(a)(1) of the Act.

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November 13, 2003:

Discharged Jeff Winslett:

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Jeff Winslett testified that Respondent employed him as a roll off driver from April 2002 until November 13, 2003. When he was employed there were eight roll off drivers. Respondent also employed residential, commercial and recycle drivers. There was one residential driver, one recycle driver and around sixteen commercial drivers. Winslett

started the 2003 Union organizing campaign among Respondent's employees.⁶ He first talked with Don Penlay. Then he and Penlay talked to the other drivers. He talked to others in the parking lot, at the fuel pumps, at employees' homes and on both his home phone and his Nextel phone in his Company truck. Winslett contacted a Teamsters' local in Indiana and was referred to Local 7 in Kalamazoo.

After the Union campaign started, Winslett was directed to bring his Nextel phone in to the office where Respondent disabled the two-way communication capability. Thereafter Winslett could talk on his Nextel only with the office. He could no longer discuss the Union or anything else with other drivers.

On October 22 Winslett attended a safety meeting. After talking about safety and mentioning that a 9 year old girl had been killed by one of their trucks at another facility, Eric Stoub said, that "he didn't need nobody sitting around the table telling him what to do, he had his own program, there was, there was nothing that they could do that would make any thing faster, they slow things down." Stoub pointed to Winslett and throwing up his hands in Winslett's face, said if Winslett "had any problems to put 'em on the table, if anybody had any problems, put 'em on the table."

Winslett replied, "There is some problems." He testified,

"I said what we, what we have is these guys, they're, they're not liking the way you're giving incentive and taking it away, giving it to other people and not giving it to people. So it's not fair across the board. I said that downtime is a big issue. You give it to the people you want, you take it away when you want. I said it's the way, the way it's being handled and being dealt with to different, from route to route.

I said it's, it wasn't, it wasn't acceptable to anybody that that's mostly why these guys were upset."

During the meeting Stoub smiled after Winslett asked if he wasn't referring to the Union?"⁷

As shown above as he was making his run on October 31 Winslett noticed that Sonny Fuller and Gil Logan were following him. After Winslett made his first stop, Logan and Fuller came over. Logan swung Winslett's truck door open and, while standing a foot or two from the truck, Logan yelled, what is it you want from this company; what is your problem; and if Winslett wanted a Union job, go someplace else and get one.

⁶ Donald Penlay testified that Jeff Winslett was the employee that first approached Penlay about the Union. That happened at the end of September 2003. Penlay then talked to other employees about supporting the Union.

⁷ Eric Stoub testified about the safety meeting with the roll off drivers on October 22. He testified that he had no knowledge of a Union organizing drive at that time. He admitted that he discussed with Winslett during that meeting a glitch in the incentive plan. Stoub told Winslett that he would fix those problems with the incentive plan. Stoub denied that he ever threatened or coercively interrogated any employee about supporting the Union. He denied that he solicited grievances during the October 22 meeting in order to undermine the Union. Stoub denied that he ever remedied grievances in order to undermine union support.

Logan said they had their own program and this is no place for anybody that wanted anything to do with the Union and that if Winslett knew anything about the Union, he should tell them. Gil Logan also said that if "we voted the Union in, that the company was gonna go broke, be belly up and (Winslett) and a lot of other drivers would be without work." Logan kept saying that Winslett should not have anything to do with the Union; that the Union isn't coming in; and that Winslett was putting other drivers' jobs in jeopardy.⁸ Fuller told Winslett that if the Union came in that he (Fuller) wouldn't have a job. Fuller then gave Winslett an inspection sheet and told him to sign it. Winslett signed the inspection sheet without reading it. That was the first time Winslett had been inspected by either Logan or Fuller.⁹

Shortly before November 9 Winslett phoned Sonny Fuller after receiving a complaint that John Tomlinson had been threatened by another employee to keep his mouth shut about the Union. Winslett told Fuller that the guy that threatened Tomlinson was on the fire department with Fuller. Fuller told Winslett they do not tell the employees they can threaten anyone. They do tell the employees that they can voice their opinion. Fuller then asked Winslett what did he know about the Union. He asked if Winslett was involved. Fuller asked if Winslett was leading the Union and was he trying to get the Union in. Winslett said that he did not want to discuss what he was doing at home and he said that he didn't know anything about the Union but there were a lot of people real unhappy. Fuller said, "I'm gonna lose my job if the union comes in." Fuller asked what did Winslett want him to do and Winslett replied that he should apologize to Tomlinson. Fuller said, "Why should I do that?" Winslett replied, "if you don't I'm gonna take this tape recording to the Board of Labors." The next morning John Tomlinson told Winslett that Fuller had come to him and apologized and said it would not happen again.

On November 9 Winslett attended a meeting called for the employees by Union Business Agent Andy Muelman at the Waffle House. That was the first meeting held by the Union. Several employees including Jeff Winslett signed authorization cards.

Within a day or so before or after November 9 Winslett talked with Tom Golden and Sonny Fuller. Golden asked Winslett what did he know about this union stuff. Winslett replied, "absolutely nothing." Fuller said, "well now we're hearing rumors," and

⁸ Gilbert Logan testified about the check that he and Sonny Fuller conducted on Jeff Winslett. Winslett passed them on a four-lane highway as he and Fuller were returning to Respondent's office. They then turned around and followed Winslett. Logan observed Winslett swerve into the left lane to avoid a vehicle turning into a McDonald's restaurant. Winslett was traveling over the speed limit and then he continued to speed through a residential district. Logan and Fuller stopped and talked with Winslett. Winslett told them they were forcing him to drive fast in order to make the money that he needed to make. Logan denied telling anyone that if they did not like the way the company was run they could go work for a union company. He denied saying the plant would close if the union was selected and he denied telling anybody that the pay rate would increase if they didn't select the union.

⁹ Supervisor Jim Johnson called Winslett during his conversation with Logan and Fuller and told Winslett that he was running 40 minutes behind on his run. Winslett told Johnson that he was there at the leaf box getting an hour-long inspection with Logan and Fuller.

he said, “if you know anything about this union stuff, you ought a just come to us right now.”

5 On the next day, Fuller came to Winslett holding a roll sheet with all the drivers’ names on the sheet. Fuller told Winslett that he did not have to point out any one but he should smile if Fuller pointed to the name of anyone involved with the Union. Winslett replied that he could not do that. Fuller repeated that Winslett was to just smile and he then went down the list of names. Winslett did not respond to any of the names until
10 Fuller named some of his own buddies in the fire department. Winslett then started smiling. Fuller also pointed to Winslett’s name and Winslett smiled. Fuller dropped the roll sheet and said, “this ain’t gonna work, is it?”

15 On November 13 Winslett was called in and discharged by Eric Stoub. Sonny Fuller was also present. According to Winslett, Stoub said that he had been hearing some bad things about Winslett, that Fuller and Logan had followed Winslett and Winslett was speeding. Eric Stoub also said that some anonymous person called and said that Winslett was speeding excessively and blowing stop signs. Stoub handed Winslett his discharge.

20 Stoub testified that he took no action after Gil Logan and Sonny Fuller conducted an inspection on Winslett in late October. However, several days after that check, Stoub received an anonymous voice–mail message as well as a call from another anonymous individual about Winslett’s unsafe driving and that eventually led to Winslett’s discharge. After reviewing those two phone calls Stoub did review the check on Winslett made by
25 Logan and Fuller, before making his final decision to discharge Winslett.

After his discharge Jim Johnson told Winslett that he hated to lose him. Winslett said the discharge had something to do with the Union. Johnson said that he didn’t hear too much about it but he did hear a little.

30 The parties stipulated that among other things, if called Russell Drake would testify that he received speeding tickets while working for Respondent but there were no repercussions in terms of reprimands.

35 ***Findings:***
Credibility:

40 The record and my findings herein, prove that Respondent knew Jeff Winslett was a Union supporter from early during the Union organizing campaign. As shown above, credited evidence showed that Winslett was selected for special comments from Stoub regarding union activity during an October 22 safety meeting. I credited Winslett’s testimony regarding an October 31 confrontation he had with Gil Logan and Sonny Fuller. It was obvious from the credited evidence that Logan believed that Winslett supported the Union. I credited Winslett as well as John Tomlinson, regarding incidents
45 in the first part of November involving Sonny Fuller. Winslett was credited in his

accounts of encounters with first supervisors Golden and Fuller and subsequently with Fuller, after November 9.

I was not impressed with Gil Logan's demeanor. Logan made several changes in his testimony after being confronted with discrepancies. For example, he initially testified that he and Fuller were returning from lunch when they saw and followed Jeff Winslett. When confronted with the time listed on the inspection report (i.e., 10:45 a.m.), he testified that he did not recall whether he and Fuller were returning from lunch. Moreover, Logan never testified that he or Fuller confronted Winslett about his driving or job performance when they met on October 31.¹⁰ Additionally, Logan was unable to explain various notations on his inspection report¹¹ and he was unable to recall how fast Winslett was driving on October 31. Respondent called Fuller and he testified but he was not asked about the alleged October 31 check on Winslett.

Eric Stoub's testimony was vague and incomplete. For example, he testified that he did not know who had completed Winslett's discharge letter other than that he did not dictate the letter and evidence regarding who prepared the discharge letter was not forthcoming during the hearing or thereafter. Moreover, the record is confused regarding anonymous phone complaints about Winslett. That evidence allegedly involved two anonymous phone calls and one of those two was on Respondent's voice mail. Stoub testified that he talked to another caller but he was unable to recall when the call occurred;¹² he was unable to recall which truck the caller referred to; and he expresses some uncertainty as to the sex of the caller. In consideration of Stoub's demeanor, his testimony and the full record, I do not credit his testimony to the extent it conflicts with other evidence. I specifically do not credit his testimony regarding the reason he discharged Jeff Winslett.

I specifically discredit the testimony of Stoub and others, which Respondent pointed to in its brief as showing that Winslett was an unsafe driver. Respondent pointed to three alleged incidents. One was the October 31 incident involving Winslett, Logan and Fuller. As to that incident I find that Logan and Fuller did not criticize Winslett's driving. Instead they engaged in heated conversation against union activity and nothing was done to show concern with safe driving. The other two incidents involved alleged anonymous phone calls. One was on a voice mail and that recording was received in evidence. The second anonymous call was allegedly received directly by Eric Stoub and his recollection was so vague and inconsistent that I do not credit any of that testimony.

¹⁰ In fact neither Logan nor Fuller disputed Winslett's testimony that nothing was done on that occasion which demonstrated they were conducting an actual inspection. For example, Logan and Fuller were not shown to have engaged in walking around and examining the truck or in discussing with Winslett his driving speed.

¹¹ Winslett testified that he signed the October 31 inspection report without reading it but when given to him he didn't see any writing on the report other than typing at the top of the page.

¹² Nevertheless, Winslett's termination notice (RExh. 1) states that the general manager received a call that truck #314 was driving carelessly and at a high rate of speed.

Findings:

I shall examine the evidence in light of the standard set out in **Wright Line**, 251 NLRB 1083 (1980). The credited evidence shows that Jeff Winslett was the most active employee involved in Union organizing activities; Respondent knew of Winslett's activities; Respondent demonstrated animus toward its employees' Union activities as shown by my findings herein; and Respondent acted within a short time after learning of Winslett and other employees' Union activities, by discharging Winslett on November 13, 2003.

Respondent argued that Winslett was not discharged because of his Union activities. Instead he was discharged because he operated his work vehicle in an unsafe manner. In that regard and as shown above, Respondent pointed to three alleged incidents. The first involved Logan and Fuller's alleged inspection stop of Winslett on October 31. The second allegedly involved an anonymous voice mail Respondent received on November 4, 2003.¹³ The caller stated that the driver of truck 374 was driving way too fast and failed to stop at a stop sign.¹⁴ General Manager Stoub testified that a few days later he talked with a caller that complained about someone driving a truck other than number 374. When Stoub checked he discovered that Winslett had been driving the truck in question.¹⁵ After receiving the voice mail and phone call about Winslett's driving Stoub contended that he reviewed Logan and Fuller's account of their October 31 encounter with Winslett. Stoub then decided to discharge Winslett.

Respondent also argued that if it had wanted to discharge Winslett because of his union activities, it would have done so on either October 31, November 4 or after Stoub talked to the second anonymous called about Winslett's driving.

As shown above, I do not credit the evidence Respondent pointed to regarding the October 31 inspection and the anonymous phone call to Eric Stoub, as supporting a finding that Winslett was an unsafe driver. The full record shows that the October 31 incident did not actually involve an inspection and it did not involve criticism of Winslett's driving. Instead Logan and Fuller stopped Winslett in order to interrogate and threaten him about union activity.

¹³ Jeff Winslett testified that he learned on November 5 of a phone call complaining that he was speeding in truck 374.

¹⁴ On November 5 Winslett found a note in his box stating that a woman left a voice mail claiming that truck 374 was in Lakeside driving at excessive speeds and blowing stop signs.

Winslett credibly testified without dispute that after receiving the note on November 5 he talked with his supervisor, Jim Johnson. Winslett told Johnson that he had not driven at excessive speeds and that it was impossible to run any stop signs on that route. Johnson told Winslett that he did not think it was a big deal and Winslett was not to worry about it because they get 5–6 calls a day.

¹⁵ Respondent argued in its brief that that phone call was received by Eric Stoub on November 13. However, Eric Stoub testified that he did not recall when he received that phone call. Respondent argued that Winslett testified that he drove truck 314 on November 13. However, Winslett also testified that he drove that truck on the day before November 13 and in any event, there was no evidence connecting truck 314 to the complaint Eric Stoub allegedly received from the anonymous caller.

As to the November 4 anonymous call, the evidence failed to show that Respondent seriously considered that matter in a timely fashion. In fact Supervisor Jim Johnson told Winslett that it was not a serious matter. Moreover, the record failed to show that Respondent did anything about that recorded call such as investigating whether it was accurate. Finally, as to the second anonymous call¹⁶ I have discredited Stoub's testimony and find there is no credited evidence to show that call was actually received.

General Counsel proved that Winslett engaged in extensive Union activity; that Respondent knew of Winslett's Union activity; that Respondent demonstrated animus and that Winslett was discharged during Respondent's most active anti-union activities.

Among other things, Respondent argued in its brief that it knew nothing of its employees' union activities until the first election petition was filed in December 2003. However, the full record including an admission by Respondent's operations manager, shows that Respondent knew about employees' union activities as early as October 2003. Operations Manager Tom Golden admitted that he and Sonny Fuller talked to Jeff Winslett in late October or early November in an effort to find out what the union campaign was all about. Golden testified that he and Fuller were trying to get at the root cause of the union effort and that they wanted to know the employees' problems.

I find that General Counsel proved that Winslett was discharged because of his Union activities. As shown above I do not credit Eric Stoub's testimony that he discharged Winslett because of two phone calls and an inspection report.

Finally, under the **Wright Line** test I shall consider whether Respondent proved it would have discharged Winslett in the absence of his Union activities. Here, Respondent relied on the same argument it advanced above. It contended that it would have discharged Winslett because of the two anonymous phone calls and its report from Gil Logan and Sonny Fuller regarding their alleged October 31 inspection. Here, I shall give particular consideration to Respondent's routine practice regarding discharging employees. General Counsel pointed to evidence of disparity in support of its contention that Winslett would not have been fired in the absence of his Union activity. In that regard, Eric Stoub received a complaint on November 19, 2003 that roll off driver Brett McCorey had tried to run over another person. McCorey was not disciplined for that incident. Willard Schmidkunz was hired after his March 25, 2002 application with Respondent even though Respondent was aware he had had a motor

¹⁶ As shown above even though Respondent argued that Eric Stoub received a November 13 phone call complaining about Winslett's driving, that argument did not accord with Stoub's testimony. Stoub was unable to recall the date of that phone call. Moreover, Stoub's full testimony illustrated that he did not recall much of that alleged phone call. Stoub could not recall the date of the call, the time of the call, whether the caller had observed the truck being driven recklessly on the same day as the call and he believed but was not positive that the caller was a woman. Even though I fully discredit Stoub's testimony regarding that alleged anonymous call I also find that even under Stoub's testimony the record failed to show that he received the alleged phone call on November 13.

accident and had been cited for making an improper turn. Schmidkunz received a traffic ticket for disobeying a traffic signal, a ticket for improper loading or towing, and a ticket for going 72 mph in a 55 mph zone. On July 11, 2002 Schmidkunz received a written reprimand and 60 days probation after two major customers called Respondent and demanded that Schmidkunz no longer service them because he had caused property and equipment damage. After being laid off Respondent recalled Schmidkunz.¹⁷

Thomas Cawley initially received two weeks suspension and loss of incentive pay for speeding excessively and failing to use proper safety practices which resulted in an accident that could have resulted in fatalities. Initially Respondent did not discharge Cawley but it subsequently changed the disciplinary action to a discharge.

Larry Abbott received an August 1, 2003 verbal warning for an accident causing damage. On September 19, 2003 Abbott received a 1–day suspension for a second accident causing damage. Jeff Winslett testified that Jim Johnson told him that Abbott was always having property damage and Johnson did not think that Abbott was going to make it.

Derrick Pence was reprimanded on December 18, 2003 for an accident that caused damage and Pence’s reprimand showed that he had multiple damage issues over the past several months. On April 26, 2004 Respondent placed a note in Pence’s file that it had received a complaint regarding Pence’s driving in a subdivision where he was driving way too fast and the caller spoke to Pence about his driving but Pence merely “blew him off.” Pence was only warned to be careful.

Roll off driver Jason Kenny was given a written warning after having four incidents of damage in October and November 2003. Daniel McGinty received a verbal warning for having three incidents of damage to customers’ property in one month. Subsequently, after receiving six calls in three months regarding property damage on McGinty’s route, Respondent issued another written warning with loss of incentive pay. On May 13, 2003 McGinty received a written warning and an indefinite suspension after he caused an accident resulting in excessive damage to one truck and some damage to another.

Roll off driver Steven Justus received a written warning after causing \$800 damage to a truck. Robert McCaffrey received a written warning on March 12, 2004 for damage resulting from his driving under a bridge with an improperly loaded container causing damage to the tarp and destroying the taper mechanism.

I have compared the above evidence with record evidence regarding Respondent’s alleged reasons for its discharge of Jeff Winslett. Winslett’s alleged basis

¹⁷ Winslett recalled that Jim Johnson told him subsequently that Schmidkunz had 10–15 accidents before Respondent finally discharged him.

for discharge included an October 31 inspection report and two anonymous calls.¹⁸ He was not alleged to have caused an accident or to have damaged anything or to have received a traffic ticket.

As to the October 31 inspection report that was admittedly disregarded by Eric Stoub when he allegedly first learned of the check. As shown above, the credited record shows that Logan and Fuller did not conduct an inspection on Winslett. Instead they used that occasion to interrogate and threaten Winslett in violation of Section 8(a)(1) of the Act.

As to the two anonymous phone calls, I have shown above that I do not credit Stoub's testimony regarding the particular call that he allegedly answered.

Finally, I am convinced that even if the evidence supported Respondent's alleged basis for discharging Winslett, the record shows that it was not Respondent's normal practice to discharge employees because of one inspection report and two anonymous phone calls. In fact there was no evidence that Respondent has ever discharged anyone for such offenses. I find that the record did not show that Respondent would have discharged Jeff Winslett in the absence of his Union activities.

November 2003:

Laid off John Tomlinson:

Laid off Dan Kuhens:

John Tomlinson started working for Respondent in March 2003. He was a roll off truck driver. Tomlinson signed a Union authorization card during the November 9, 2003 meeting at the Waffle House. On the following Monday Tomlinson's Nextel phone was blocked so he could no longer phone and talk with other drivers. He was laid off allegedly as a result of economic downsizing. Sonny Fuller told Tomlinson of his layoff and Tomlinson asked Fuller if the down sizing had anything to do with his job performance. Fuller replied, "absolutely not." Fuller said there's not been any problem with Tomlinson's job performance but the layoff was just because of economic downsizing.

Dan Kuhens started working for Respondent on April 1, 2003. Like Tomlinson, he attended the November 9 Union meeting and signed an authorization card. Kuhens last worked there on November 14, 2003.¹⁹ He was a roll off driver. Jim Johnson told Kuhens they were bringing Kuhens back to Eric Stoub's office to be fired. However, when Kuhens met with Eric Stoub, Stoub told Kuhens that he was being laid off and the layoff had nothing to do with Kuhen's work performance but that it was because they didn't have enough work.

¹⁸ Eric Stoub testified that he received a voice mail on November 4 (RExh. 21) and a phone call after that voice mail. Stoub did not recall how many days after November 4 he received the phone call.

¹⁹ Kuhens received two warnings from Respondent (RExh. 13, 14).

Tomlinson attended the October 22 safety meeting. As shown above, Eric Stoub told the drivers that he did not need somebody from outside to come in and tell us how to do things or what to do. He also talked about Respondent's incentive pay process and in answer to a question by Tomlinson, Stoub said those things including incentive pay could be worked out by us and that the didn't need somebody from outside coming in and telling us how to do it. As shown above, at one point during the meeting, Jeff Winslett asked Eric, "You are talking about the union, aren't you." Eric did not answer but he did have a real big smile in response to Winslett.

During work while Tomlinson was at Respondent's fuel pump, a man that he did not know told him, "I want you to give a message to your roll off buddies." Tomlinson replied that he did not know what the man was talking about and the man said, "well you roll off guys have been trying to get the union in here, three years ago you tried it and now you're trying it again. I don't want you trying to bring the union in here. I want this crap to stop." Tomlinson told the man that he did not appreciate being threatened. Tomlinson phoned Jeff Winslett and told Winslett about the conversation. Winslett told him that he would take care of it.

Winslett phoned Sonny Fuller shortly before November 9, 2003. Winslett told Fuller that a guy threatened Tomlinson about Union activity and the guy was on the fire department with Fuller. Fuller told Winslett they do not tell the employees they can threaten anyone. They do tell the employees that they can voice their opinion. As shown above as the conversation continues, among other things, Fuller said, "I'm gonna lose my job if the union comes in."

The following day Sonny Fuller called Tomlinson into his office and asked about the incident at the fuel pump. Tomlinson told him what had happened. Fuller apologized to Tomlinson and told him that he would take care of the matter.

Eric Stoub testified that Dan Kuhens and John Tomlinson were laid off because:

Well, in, in this area the, the business is somewhat seasonal and it's been my experience that especially in roll off business slows down anywhere from the first of November, the middle of November through the end of March due to weather, construction slows down, that type of thing.

** * **

*Well, I think, if I remember right, we first looked at what line of business was slowing down and that was identified roll off.
And then I think it was who was last hired or seniority of something like that.*

As shown above, when Jeff Winslett was fired on November 13, Respondent had 8 roll off drivers at its Stevensville facility. Donald Penlay testified that after Kuhens and Tomlinson were laid off they had some new drivers come in from South Haven and Respondent's safetyman (Dennis) did some roll off driving. Tommy Golden did roll off driving one Saturday.

Tomlinson testified that he knew of the hiring of roll off drivers by Respondent at Stevensville after he was laid off. Those were some of Respondent's roll off drivers from its South Haven facility – Mac, Larry and Dave. On Tomlinson's last day he saw Mac,
 5 Larry and the safety director, Dennis, driving roll off trucks. None of those three drove roll off trucks at Stevensville while Tomlinson worked there.

After their layoffs Tomlinson and Dan Kuhens were offered jobs by Respondent.²⁰ One of those jobs was at Respondent's Elkhart facility. Tomlinson asked
 10 Sonny Fuller which of the two jobs he would get if both he and Kuhens applied. Fuller replied that he guessed it would be determined by seniority.

Findings:

Credibility:

As shown above I do not credit the testimony of Eric Stoub or Sonny Fuller. I do credit the testimony of Dan Kuhens and John Tomlinson. I make those findings as shown above in view of my observation of demeanor and the full record.

Findings:

Again, as in the case of Winslett, I shall consider this matter in light of **Wright Line**, 251 NLRB 1083 (1980). The allegedly unlawful activity against Kuhens and Tomlinson occurred during the Union organizing campaign and, as shown above, at a
 25 time when Respondent knew that some of its employees were engaged in Union activity. As shown above Respondent demonstrated its animus against those employees' union activities and the layoffs of Kuhens and Tomlinson occurred within a few weeks of Respondent first learning of the employees' union activities.

However, there was very little evidence showing that Respondent knew that Tomlinson or Kuhens were personally involved in union activity.

Kuhens as well as Tomlinson did attend the Waffle House Union meeting on November 9, 2003 but there was no evidence that Respondent knew that Kuhens or
 35 Tomlinson attended that meeting.

Regarding Tomlinson, there were three incidents that raised the possibility that Respondent knew that he was involved in Union activity. During the October 22 safety meeting Tomlinson asked Eric Stoub about incentive pay and Stoub replied to the effect
 40 that that could be worked out and he did not need somebody from outside coming in and telling us what to do. The day after that safety meeting, another employee

²⁰ The offer of jobs to Kuhens and Tomlinson followed a petition filed on January 12 and a February 19, 2004 election held among Respondent employees at Stevensville and South Haven Michigan and Elkhart, Indiana. The Union lost the election. Kuhens and Tomlinson received their job offers on March 22, 2004. Respondent pointed out in its brief that the Union initially filed a petition on December 3, 2003 but that petition was withdrawn.

confronted Tomlinson at the fuel pump. That employee told Tomlinson that he did not appreciate the roll off drivers trying to get the Union in and the wanted the Union crap to stop. That incident came to the attention of Respondent when Jeff Winslett complained to Sonny Fuller. Tomlinson testified that he was subsequently called in by Fuller and asked what had occurred. He told Fuller about the other driver saying that he wanted the Union crap to stop.²¹ Finally, on November 9 Tomlinson attended the Union meeting at the Waffle House and he signed a Union authorization card.

As to those three incidents it is obvious from the record that Respondent, through its supervisors Eric Stoub and Sonny Fuller, knew of the activity involving Tomlinson during the October 22 safety meeting and Tomlinson's involvement during and after the incident at the fuel station. There was no evidence showing that Respondent knew of the November 9 Waffle House Union meeting, or that Tomlinson attended that meeting, or that Tomlinson signed a Union authorization card.

Both Kuhens and Tomlinson were roll off drivers and, it is apparent from the record that roll off drivers at Stevensville were the employees that were most involved with the Union. As to whether Respondent knew that Stevensville roll off drivers were leaders in the effort to organize, the record showed (1) there were 8 Stevensville roll off drivers at the time of Jeff Winslett's November 13 discharge; (2) Jeff Winslett, who was one of those eight Stevensville roll off drivers, was the most obvious union supporter; (3) Eric Stoub limited attendance at his October 22 safety meeting to Stevensville roll off drivers and he spent much of that meeting telling the drivers they did not need outside help; (4) Russell Drake told supervisor Jim Johnson that the roll off drivers were the employees most involved with the Union; (4) shortly before November 9 Tomlinson was linked to the union campaign when Jeff Winslett told Sonny Fuller that Tomlinson had been threatened by another employee at the fuel pump over union activity; and (5) Winslett, Kuhens and Tomlinson were discharged or laid off in rapid succession on November 13 and 14, 2003.²²

As in the case of Jeff Winslett, Respondent argued among other things that it had no knowledge of employees' union activities until the first petition for an election was filed in December. However, the full record including an admission by Respondent's operations manager shows that Respondent knew about employees' union activities as early as October 2003. Operations Manager Tom Golden admitted that he and Sonny Fuller talked to Jeff Winslett in late October or early November in an effort to find out what the union campaign was all about. Golden testified that he and Fuller were trying to get at the root cause of the union effort and that they wanted to know the employees' problems.

Respondent also argued that Kuhens and Tomlinson were laid off because a decline in work and that is along the lines of what Kuhens and Tomlinson were told at

²¹ As shown below I credit Tomlinson's testimony regarding his meeting with Fuller and to the extent there are conflicts, I do not credit Fuller.

²² Respondent conceded in its brief that both Kuhens and Tomlinson were laid off on November 14, 2003.

the time of the layoffs. However, the evidence failed to show anything in the nature of level of work, proximate to November 14 that would cause a layoff. Moreover, there was no showing that Respondent had reason to anticipate that work would decline to an extent that would cause Respondent in the normal course of business, to terminate three roll off drivers.

General Counsel offered testimony and Respondent conceded in its brief, that it used supervisors and roll off drivers from other locations to fill in as roll off drivers at Stevensville during the 2003–2004 winter season.

In view of that evidence and the full record, I find that Respondent laid off Kuhens and Tomlinson because of its employees' union activities and the evidence failed to show that Kuhens and Tomlinson would have been laid off in the absence of the employees' union activities.

On March 1, 2004 Respondent offered Kuhens and Tomlinson jobs²³ as roll off drivers. General Counsel contended that Kuhens and Tomlinson rejected those offers because they did not believe the jobs offered were comparable to their previous jobs. Additionally, Respondent argued that Kuhens and Tomlinson were obligated to apply for work with Respondent and that they failed to do so. I find the record was not fully developed on those questions and those matters should be resolved, if necessary, during compliance proceedings.

Conclusions of Law

1. By interrogating its employees about their union activities; by more strictly enforcing work rules because of its employees' union activities; by threatening its employees, (1) that the company would go broke, (2) that the Union would cause a lot of drivers to be out of work, (3) that employees would be forced to leave and find other work because of the Union, (4) that Respondent was no place for anyone that wanted the Union, and (5) that a supervisor would lose his job if the Union came in; by granting a pay increase before an NLRB election to persuade the employees to not support the Union; by soliciting and promising to remedy employee grievances because of the union; and by attempting to coerce an employee to quit; Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

2. By discharging its employee; by laying off two employees; and by failing to reemploy those employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

3. Other allegations in the complaint not included above in this section of the decision, and for which General Counsel failed to introduce evidence are hereby dismissed.

²³

Respondent also pointed out that Jeff Winslett was offered employment by one of its subsidiaries.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged Jeff Winslett and unlawfully laid off John Tomlinson and Dan Kuhens and failed and refused to rehire Winslett, Tomlinson and Kuhens, it must offer Winslett, Tomlinson and Kuhens immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, and Respondent must make Winslett, Tomlinson and Kuhens whole for all loss of earnings and other benefits. Back pay shall be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The Respondent, Reliable Disposal, Inc., at Stevensville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union activities;

(b) More strictly enforcing work rules because of our employees' union activities;

(c) Threatening its employee they will be forced to leave and find other work because of the union;

(d) Threatening its employees that Respondent is no place for anyone that wanted the union;

(e) Threatening its employees that the union would cause the company to go broke;

(f) Threatening its employees that the union will cause a lot of drivers to be out of work;

(g) Threatening its employees that a supervisor will lose his job if the Union came in;

(h) Granting its employees a pay increase in an effort to undermine the Union;

(i) Soliciting an promising to remedy employee grievances because of the Union;

(j) Attempting to coerce and employee to quit because of the Union;

(k) Discharging its employees because of its employees' union activities;

(l) Laying off its employees because of its employees union activities;

(m) Refusing to reemploy or reinstate its employees because of their union activities; and

(n) In any other like or related manner restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer full and immediate reinstatement to Jeff Winslett, John Tomlinson and Dan Kuhens to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs without loss of pay or benefits, and to make Winslett, Tomlinson and Kuhens whole for all loss wages and other benefits, computed on a quarterly basis from date of discharge or layoff, to date of proper offer of reinstatement, less any net interim earning.

(b) Within 14 days from the date of the Order, remove from its files any reference to the unlawful discharge of Jeff Winslett and the unlawful layoffs of John Tomlinson and Dan Kuhens and within 3 days thereafter notify Winslett, Tomlinson and Kuhens in writing that this has been done and that Winslett's discharge and Tomlinson and Kuhens' layoffs will not be used against either of them in any way.

(d) Within 14 days after service by the Region, post at its Stevensville, Michigan facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these

proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 22, 2003.

5 (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C

Pargen Robertson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

5

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board had found that we violated Federal labor law and has
10 ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

15

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unlawfully interrogate our employees about their activities on behalf of Local
20 No. 7, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization.

WE WILL NOT threaten our employees they will be forced to leave and seek another job if they
continue to support Local No. 7, International Brotherhood of Teamsters, AFL–CIO, or any
other labor organization.

25

WE WILL NOT threaten our employees they we are no place for anyone that wants Local No.
7, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization.

WE WILL NOT threaten our employees the Company will go broke if they select Local No. 7,
30 International Brotherhood of Teamsters, AFL–CIO, or any other labor organization as their
bargaining representative.

WE WILL NOT threaten our employees that the Union will cause a lot of drivers to be out of
work if they support Local No. 7, International Brotherhood of Teamsters, AFL–CIO, or any
35 other labor organization.

WE WILL NOT threaten our employees that a supervisor will lose his job if they support the
Union, or any other labor organization.

40 **WE WILL NOT** solicit and promise to remedy employee grievances in order to persuade our
employees to not support the Union.

WE WILL NOT remedy employee grievances in order to undermine support for Local No. 7,
International Brotherhood of Teamsters, AFL–CIO, or any other labor organization.

45

WE WILL NOT coerce our employees to quit work because of their support of the Union.

WE WILL NOT grant bargaining unit employees a pay raise before an NLRB election in order to undermine support for Local No. 7, International Brotherhood of Teamsters, AFL-CIO, or any other labor organization.

5

WE WILL NOT more strictly enforce work rules by using our driver inspection program to unlawfully interfere with employees' union and other protected activities.

WE WILL NOT terminate by discharge or layoff, our employees because of our employees' union or other protected concerted activity.

WE WILL NOT discharge or employee Jeff Winslett and **WE WILL NOT** layoff our employees John Tomlinson and Dan Kuhens because of their union or other protected concerted activity.

WE WILL offer Jeff Winslett, John Tomlinson and Dan Kuhens immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs.

WE WILL immediately make Winslett, Tomlinson and Kuhens whole for losses suffered because we terminated them by discharge or layoff because of our employees' union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Jeff Winslett and the unlawful layoffs of John Tomlinson and Dan Kuhens, and **WE WILL**, within 3 days thereafter, notify Winslett, Tomlinson and Kuhens in writing that this has been done and our unlawful actions will not be used against either of them in any way.

30

RELIABLE DISPOSAL, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

40

477 Michigan Avenue, Room 300, Detroit, Mi 48226-2569
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

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THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.